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Supreme Court, U.S.
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Nos. 00-1295 and 00-1471

IN THE

Supreme Court of the United States

Community Health Partners, et al.,
Petitioners,

v.

Commonwealth of Kentucky, et al.,
Respondents.

Kentucky Association of Health Plans, et al.,
Petitioners,

v.

Commonwealth of Kentucky, et al.,
Respondents.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

Petitioners respectfully submit this supplemental brief in light of this Court's decision in *Rush Prudential HMO* v. *Moran* (June 20, 2002) (No. 00-1021) ("*Rush Prudential*").

The petitions for certiorari in these cases present the Court with the opportunity to resolve the entrenched circuit conflict over whether state "any willing provider" ("AWP") statutes are preempted by ERISA. AWP laws require health benefit plans to admit any provider willing to abide by the plans' terms. Such statutes prohibit the selective provider networks that permit HMOs to reduce costs while ensuring quality care. Because the question presented turns on the meaning of ERISA's insurance "saving clause" (29 U.S.C. 1144(b)(2)(A)), this Court held these petitions pending its decision in *Rush Prudential*.

Because this Court's ruling in *Rush Prudential* will not provide the lower courts with any substantial guidance on how to resolve the question presented, certiorari should now be granted. The circuit conflict at issue – principally between decisions of the Fourth and Sixth Circuits sustaining AWP statutes and the Fifth and Eighth Circuits holding them preempted by ERISA – turns on a disagreement about whether the saving clause applies to agreements between insurers and third-party providers.

Courts that invalidate AWP laws have concluded that provider agreements are not a part of the insurance relationship. Thus, the Eighth Circuit rejects the argument that AWP statutes affect "an integral part of the policy relationship" between insurer and insured. Rather, at most, such statutes "might be an integral part of the relationship between the insurer and a third party to the insured-insurer relationship, the health care provider." *Prudential Ins. Co. of Am.* v. *National Park Med. Ctr.*, 154 F.3d 812, 829 (1998). In reaching that conclusion, the Eighth Circuit relied heavily on this Court's holding in *Group Life & Health Insurance Co.* v. *Royal Drug*,

440 U.S. 205 (1979) ("*Royal Drug*"), that provider contracts do not constitute the "business of insurance." By contrast, circuits sustaining AWP statutes concede the factual predicate underlying that conclusion – *i.e.*, that "AWP laws do not change the substantive terms of the insurance coverage" (Pet. App. 66a (decision below)) – but disagree fundamentally about its legal significance.

This Court's decision in *Rush Prudential* simply did not address the core question that has divided the courts of appeals with respect to AWP statutes. Citing *Royal Drug*, *Rush Prudential* reiterates the settled rule that the saving clause applies to the "business of insurance" rather than the "business of insurers." Slip op. 8. Thus, "when insurers are regulated *with respect to their insurance practices*, the state law survives ERISA." *Id.* (emphasis added). But beyond this reiteration of settled law, the Court in *Rush Prudential* had no cause to address the critical question of what constitutes an "insurance practice." Cf. *id.* ("this is not the place to plot the exact perimeter of the saving clause"). This Court's decision, including its holding that HMOs are insurers for purposes of the saving clause, did not speak to that issue. If these cases were remanded in light of *Rush Prudential*, the lower courts would accordingly continue to disagree over whether state regulation of contracts between insurers and third-parties, such as the provider networks at issue in these cases, constitutes regulation of "insurance practices," and the circuit conflict would continue unabated. Cf. *id.* at 7 (recognizing that the vague wording of ERISA's preemption and saving clauses regularly require the Court to address specific conflicts arising under the statute).

Nor should this Court defer review of the question presented in the outside hope that the circuits will now line up uniformly on one side of the split or the other. The uncertain status of AWP statutes, which exist in half the states, is simply too important an issue to remain unresolved. As the Solicitor General explained in response to this Court's invitation

to state the views of the United States, certiorari is warranted with respect to the question presented because "[t]he issue that has caused the conflict in the circuits, as well as the accompanying difficulty the courts have had in analyzing AWP laws, is important." S.G. Br. 19. Because "[m]anaged-care entities subject to the strictures of these laws deliver a substantial portion of health services nationwide," "[i]t is important that the permissible scope and limits of state authority in this area be defined." *Id.*

The petition for certiorari in No. 00-1295 demonstrated (at 26) that the AWP statutes of at least nine different states have been challenged in fourteen different lawsuits, with more than half invalidated. Indeed, it is no exaggeration to say that the legal controversy over the status of AWP statutes has been greater than with respect to "any other state law regulating managed care organizations." Larry J. Pittman, *"Any Willing Provider" Laws And ERISA's Savings Clause: A New Solution For An Old Problem*, 64 TENN. L. REV. 409, 428 (1997).

The number of opportunities for the lower courts to revisit the entrenched circuit conflict will moreover be limited because the question presented arises in the context of many state laws that have already been invalidated and thus go unenforced. Specific judgments of federal courts now prohibit insurance officials in Alabama, Arkansas, Georgia, Louisiana, and Texas from applying their states' AWP statutes (00-1295 Pet. 26 & n.12); the decisions of the Fifth and Eighth Circuits that AWP statutes are preempted furthermore presumptively prohibit enforcement of such laws in Minnesota, Mississippi, North Dakota, and South Dakota (see *id.* 2). Whatever might be said regarding the relevance of this Court's decision in *Rush Prudential* to the question presented, there certainly is no plausible argument that it renders AWP statutes *a fortiori* lawful.

As a consequence, AWP laws in many states will remain unenforced, such that they will not be subject to challenge; the Fifth and Eighth Circuits, in turn, are unlikely to be pre-

sented with further opportunities to revisit their prior decisions. Health benefit plans will therefore be left to suffer through the intolerably inconsistent state regulation of provider networks.

In sum, these cases present an ideal opportunity for the Court to resolve this uncertain state of affairs and to further define the parameters of the insurance savings clause so as to avoid needless and time consuming litigation in the future. They accordingly contrast in every important respect with *United States Healthcare Systems of Pennsylvania* v. *Pennsylvania Hospital Insurance Co.*, which the Court similarly held pending its decision in *Rush Prudential* but subsequently denied certiorari (No. 01-200, order of June 24, 2002).

Petitioners finally respectfully suggest that the petitions for certiorari be consolidated for briefing and argument. Petitioners have agreed among themselves that oral argument will be conducted by one counsel. Consolidating the cases simply ensures that both sets of petitioners receive equal status in briefing rather than relegating one to the role of an *amicus*.

CONCLUSION

For the foregoing reasons as well as those set forth in the petition and reply, certiorari should be granted and the cases consolidated.

Respectfully submitted,

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